

### 3.1 Excessive Force—Compensatory Damages

[Updated: 6/14/02]

#### **Pattern Jury Instruction**

If you find that [defendant] used excessive force against [plaintiff], and thereby caused damages to [him/her], you will then assess an amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all [plaintiff]'s damages caused by that conduct. Compensatory damages are not allowed as a punishment and cannot be imposed or increased to penalize [defendant]. You may award only such damages as you find by a preponderance of the evidence to have been caused by unconstitutionally excessive force as I have defined it. It is not necessary for [plaintiff] to prove the amount of [his/her] damages with certainty. On the other hand, [plaintiff] is not to be awarded purely speculative damages.

<sup>1</sup>{ If you should award damages, they will not be subject to federal or state income taxes, and you should therefore not consider such taxes in determining the amount of damages. }

<sup>2</sup>{ [Plaintiff] has the duty to mitigate [her/his] damages—that is, to take reasonable steps that would reduce the damages. If [she/he] fails to do so, then [she/he] is not entitled to recover any damages that [she/he] could reasonably have avoided incurring. [Defendant] has the burden of proving by a preponderance of the evidence that [plaintiff] failed to take such reasonable steps. }

<sup>3</sup>{ If you find that [plaintiff] is entitled to damages for losses that will occur in the future, you will have to reduce this amount, whatever it may be, to its present worth. The reason for this is that a sum of money that is received today is worth more than the same money paid out in installments over a period of time since a lump sum today, such as any amount you might award in your verdict, can be invested and earn interest in the years ahead.

You have heard testimony concerning the likelihood of future inflation and what rate of interest any lump sum could return. In determining the present lump sum value of any future earnings you conclude [plaintiff] has lost or future damages [plaintiff] will suffer, you should consider only a rate of interest based on the best and safest investments, not the general stock market, and you may set off against it a reasonable rate of inflation. }<sup>4</sup>

The elements of damages that you may consider are as follows:

1. Reasonable past and future medical expenses incurred by [plaintiff] in securing treatment for injuries caused by [defendant]'s conduct.

2. An amount for any pain and suffering, emotional distress and humiliation that you find from the evidence [plaintiff] endured or will endure as a result of the excessive force. Even though it is obviously difficult to establish a standard of measurement for this element, that difficulty is not grounds for denying recovery. You must, therefore, make the best and most reasonable estimate you can, not from a personal point of view but from a fair and impartial point of view of the amount of pain and suffering, emotional distress and humiliation that [plaintiff] incurred or will incur as a result of the excessive force and you must place a money

value on this, attempting to come to a conclusion that will be fair and just to the parties. This will be difficult for you to measure in terms of dollars and cents, but there is no other rule I can give you for assessing this element of damages.

3. If you find that [plaintiff] has proven by a preponderance of the evidence that [defendant] violated [his/her] constitutional rights but that [he/she] has not proven any actual injury caused by the violation, you must nevertheless award [plaintiff] nominal or token damages such as One Dollar (\$1) or some other minimal amount.<sup>5</sup> This is so because the law recognizes that the denial of constitutional rights is itself an injury that should be recognized without regard to whether actual damages have been proven.

<sup>6</sup>{4. You may also award [plaintiff] prejudgment interest in an amount that you determine is appropriate to make [her/him] whole and to compensate [her/him] for the time between when [she/he] was injured and the day of your verdict. It is entirely up to you to determine the appropriate rate and amount of any prejudgment interest you decide to award.}

Now the fact that I have given you instructions concerning the determination of damages does not mean that I believe damages should be awarded or that they should not be awarded. I have given these damage instructions simply to assist in your deliberations if you should reach that issue. The decision remains yours as to whether or not [plaintiff] shall recover any damages against [defendant].

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<sup>1</sup> Although the First Circuit has not yet addressed this issue, those circuits that have addressed it have concluded that section 1983 damages are not taxable, even if they are calculated based on types of injury (e.g., lost wages) that would be taxable in another context. Wulf v. City of Wichita, 883 F.2d 842, 871-75 (10th Cir. 1989) (examining decisions by the Third, Fourth and Ninth circuits); Johnston v. Harris County Flood Control Dist., 869 F.2d 1565, 1579-80 (5th Cir. 1989). Therefore, this bracketed sentence may be used in cases where the tax consequences of the jury's award could be an issue.

<sup>2</sup> This bracketed paragraph may be used in cases where the plaintiff's duty to mitigate damages is an issue. Although the First Circuit has not addressed the issue of mitigation in a section 1983 case, those circuits that have addressed the issue have applied the general rule that a plaintiff has a duty to mitigate his or her damages. McClure v. Independent Sch. Dist. No. 16, 228 F.3d 1205, 1214 (10th Cir. 2000); Meyers v. City of Cincinnati, 14 F.3d 1115, 1119 (6th Cir. 1994); Johnston v. Harris County Flood Control Dist., 869 F.2d 1565, 1578-80 (5th Cir. 1989); see also Audio Odyssey, Ltd. v. Brenton First Nat'l Bank, 245 F.3d 721, 739 (8th Cir. 2001); Murphy v. City of Flagler Beach, 846 F.2d 1306, 1308-09 (11th Cir. 1988).

<sup>3</sup> These bracketed paragraphs may be used in cases where the plaintiff's claimed damages include future losses. Although the First Circuit has not yet addressed this issue, those circuits that have addressed it have held that section 1983 awards that include future damages must be reduced to present value. Chonich v. Wayne County Cmty. Coll., 874 F.2d 359, 369-70 (6th Cir. 1989) ("[A]n award of future damages must be reduced to present value in order to take into account the earning power of the money."); see also Gierlinger v. Gleason, 160 F.3d 858, 874 (2d Cir. 1998) (noting without comment that jury was instructed to reduce to present value any award of future damages).

<sup>4</sup> "The discount rate should be based on the rate of interest that would be earned on the 'best and safest investments.'" Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 537 (1983) (quoting Chesapeake & Ohio Ry. Co. v. Kelly, 241 U.S. 485, 491 (1916)). The "best and safest investments" are those which provide a "risk-free stream of future income," not those made by "investors who are willing to accept some risk of default." Pfeifer, 462 U.S. at 537; Kelly, 241 U.S. at 490-91.

<sup>5</sup> In Memphis Community School District v. Stachura, 477 U.S. 299, 306 (1986), the Supreme Court stated that "the level of damages is ordinarily determined according to principles derived from the common law of torts." The Court held that the jury could not be instructed to evaluate the importance of the constitutional right in setting the amount of a damage award and described its holding in Carey v. Phipps, 435 U.S. 247, 264 (1978), as being that "no

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compensatory damages could be awarded for violation of that right absent proof of actual injury.” Memphis, 477 U.S. at 308. In Memphis, the Court went on to say in a footnote that “nominal damages, and not damages based on some undefinable ‘value’ of infringed rights, are the appropriate means of ‘vindicating’ rights whose deprivation has not caused actual, provable injury.” Id. at 308 n.11.

<sup>6</sup> This bracketed paragraph may be used in cases where the plaintiff requests prejudgment interest. The rule in the First Circuit is that, in a section 1983 case, “it is the jury that must decide whether prejudgment interest is warranted.” Foley v. City of Lowell, Mass., 948 F.2d 10, 17 (1st Cir. 1991); accord Cordero v. De Jesus-Mendez, 922 F.2d 11, 13 (1st Cir. 1990) (“There can be no doubt that in this circuit the decision to award prejudgment interest in a federal question case lies within the sole province and discretion of the jury.”); id. (“[I]n an action brought under 42 U.S.C. § 1983, the issue of prejudgment interest is so closely allied with the issue of damages that federal law dictates that the jury should decide whether to assess it.”) (citing Furtado v. Bishop, 604 F.2d 80, 97-98 (1st Cir. 1979)). But see Gierlinger v. Gleason, 160 F.3d 858, 873-74 (2d Cir. 1998) (“In a suit to enforce a federal right, the question of whether or not to award prejudgment interest is ordinarily left to the discretion of the district court. . . .”). If a section 1983 plaintiff fails to ask the jury for prejudgment interest, he or she may not later ask the judge to award it. Foley, 948 F.2d at 17; Cordero, 922 F.2d at 13.